INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	5
Conclusion	7

CITATIONS

Cases:

Goldman v. *United States*, 316 U. S. 129	5, 7
United States v. *Ebeling*, 146 F. 2d 254	6

640588—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1083

MURRAY COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the circuit court of appeals (R. 347) is not yet reported.

JURISDICTION

The opinion of the circuit court of appeals was filed on February 23, 1945 (R. 347), and the judgment of the court was entered on March 12, 1945 (R. 348). The petition for a writ of certiorari was filed on March 26, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII

of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial court committed reversible error in failing to order federal officers to produce notes from which the officers had refreshed their recollections before taking the stand.

STATEMENT

Petitioner and one Leonard were indicted in the United States District Court for the Southern District of New York in one count charging a conspiracy to violate the Selective Training and Service Act by arranging to have a purported report of petitioner's physical examination falsely indicate that he had an irremedial hernia, with the result that he would be classified as unfit for military service (R. 5–7). Leonard pleaded guilty and testified for the Government (R. 3, 68). Petitioner was convicted (R. 331) and sentenced to imprisonment for three years and to pay a fine of $500 (R. 4, 337). On appeal to the Circuit Court of Appeals for the Second Circuit, his conviction was affirmed, *per curiam* (R. 348).

The sufficiency of the evidence to support petitioner's conviction is not here challenged. Briefly, the Government proved that in November 1941, petitioner, a restaurant owner, became friendly with Leonard and one Wilson, both of whom were clerks of the local draft board with which peti-

tioner was registered (R. 68–69).[1] Petitioner gave them free meals in his restaurant and presented them with custom-made suits, shirts, and other gifts (R. 71–74, 75–76). In April 1943, petitioner discussed with Leonard and Wilson the possibility of securing a deferment from the draft (R. 76–77). The three men conceived the idea of having petitioner's name substituted on the medical report of the examination of another registrant who would be found by the examining physicians to be suffering from an ailment rendering him unfit for military service, and decided that hernia would be a suitable defect for their purposes (R. 77–78, 79–80). Leonard and Wilson told petitioner that it would be necessary for him to take a Wasserman test in order to have some proof that he had been in the hospital for examination (R. 78). This plan was carried out. Petitioner merely had a sample of blood taken for a Wasserman test and later Leonard substituted petitioner's name on the medical report of another registrant who had been found by the examining physician to have an inguinal hernia (R. 81–82, 83–89). Petitioner was then classified by the local draft board as unfit for military service (R. 91–92). Thereafter, Leonard and Wilson received further gifts of clothing from petitioner (R. 80, 90–94).

[1] Wilson died before the indictment was returned (see R. 5).

Petitioner took the stand in his own behalf (R. 165). He admitted that he made gifts of clothing to Leonard and Wilson (R. 170–172), but denied any arrangement with them whereby another registrant's medical form would be substituted for his, and denied any agreement by which it was to be made to appear that he had a hernia (R. 174–176). He claimed that the first time he learned that he was deferred because of hernia was when agents of the F. B. I. so informed him in an interview (R. 183–184, 257–258).

In rebuttal, the Government called as witnesses the two F. B. I. agents, Davis and Johnson, who had interviewed petitioner (R. 275, 306). Each testified that they questioned petitioner about his gifts to Wilson (R. 278–279, 308–309); that they asked him if he knew why he was classified 4–F, and that he replied that he did not know, that there were several things wrong with him (R. 276, 307); and that no specific physical ailments were mentioned by petitioner or by either of the agents (R. 280, 310). No notes of this interview were used by the witnesses on direct examination (R. 284, 314). On cross-examination, each of the agents admitted that before taking the witness stand he had refreshed his recollection from notes taken by Johnson during their interview with petitioner (R. 285, 290–291, 314). Petitioner's attorney asked Johnson, the second of the agents who testified, where the notes were, and Johnson

replied that they were in the F. B. I. office in the same building as the courtroom. Petitioner's attorney asked Johnson to get the notes. The prosecuting attorney objected on the ground that petitioner was not entitled to examine the notes, and the court sustained the objection. No exception was taken to this ruling. (R. 314.) Davis testified on cross-examination that the word "hernia" was not mentioned in the interview (R. 288–289), and Johnson testified that "hernia" did not appear in his notes (R. 314–315).

ARGUMENT

While *Goldman* v. *United States,* 316 U. S. 129, does not seem to have come to the attention of the court below, that ruling squarely rejects petitioner's view that a trial court's refusal to require the production of memoranda used by a Government witness to refresh his recollection before taking the stand is reversible error. This Court held that (p. 132):

> We think it the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. Where, as here, they are not only the witness' notes but are also part of the Government's files, a large discretion must be allowed the trial judge.

It is perfectly clear that there was no abuse of the trial court's discretion in this case. The existence

of the notes was disclosed on agent Davis' testimony but no demand for their production was made at that time (R. 285). When petitioner's counsel finally asked for the production of the notes during agent Johnson's testimony and the trial court denied the request, no exception was taken (R. 314).

"The record here shows nothing to suggest any impeaching value" in the notes (*United States* v. *Ebeling*, 146 F. 2d 254, 257 (C. C. A. 2)), for the agents testified on direct examination without referring to the notes, and their testimony on cross-examination was unequivocal and showed no lapse of memory as to the contents of the notes. Indeed, Johnson stated in response to direct questions by petitioner's counsel that the notes did not contain the word "hernia" or refer to any other specific ailments. Even if the notes did reveal that "hernia" was mentioned, they could not, moreover, have substantially aided petitioner's defense. They could only indicate that the fact that petitioner's classification was based on a hernia was mentioned by the agents. They could in no way indicate that this was a revelation to petitioner.[2]

---

[2] In examining the notes in the circuit court of appeals (R. 347), Judge Frank accorded petitioner greater consideration than was technically required, inasmuch as petitioner had failed to note an exception to the trial court's ruling and had failed to have the notes included in the record certified to the circuit court of appeals. See *United States* v. *Ebeling*,

CONCLUSION

The court below could not properly have ruled in petitioner's favor in the light of the decision of this Court in *Goldman* v. *United States*, 316 U. S. 129. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

APRIL 1945.

---

146 F. 2d 254 (C. C. A. 2). Petitioner's objection to this favorable treatment (Pet. 6, Br. 12–15) is therefore without merit. In this connection, we are advised by the United States Attorney that upon the argument in the circuit court of appeals, Judge Frank asked petitioner's counsel whether he had any objection to the examination of the notes by the court and that counsel replied that he did not.

U. S. GOVERNMENT PRINTING OFFICE: 1945